Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1357

In The

Supreme Court of the United States

October Term, 1987

THOMAS R. ANGEL AND LORETTA C. ANGEL,

Appellants,

v.

JUDGES CHARLES W. FROEHLICH, JR., F. V. LOPARDO, GILBERT NARES and DON MARTINSON,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

MOTION OF APPELLEES TO DISMISS OR AFFIRM

LLOYD M. HARMON, JR.,
County Counsel
County of San Diego
DANIEL J. WALLACE, Chief Deputy
Counsel of Record

LEONARD W. POLLARD II, Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
Telephone: (619) 531-4860
Attorneys for Appellees

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

18 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
PROVISION INVOLVED	2
ISSUE PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I APPELLANTS HAVE NOT STATED A CLAIM FOR INJUNCTIVE RELIEF	6
A. The Anti-Injunction Act Applies to Appellants' Claim	6
B. The Abstention Principles of *Younger v. Harris* (1971) 401 U.S. 37 Apply to Bar Appellants' Action Where They Did Not Fashion A Justiciable Constitutional Claim	7
II NO INJUNCTION MAY ISSUE SINCE IT WOULD BE INEFFECTUAL	11
III THE DOCTRINE OF JUDICIAL IMMUNITY PRECLUDES APPELLANTS' FROM STATING A CONSTITUTIONAL CLAIM	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Bradley v. Fisher (1872) 80 U.S. (13 Wall.) 335 12

Clearinger v. Saxner (1985) 474 U.S. 193 12

Hicks v. Miranda (1975) 422 U.S. 332 9

Hoffman v. Pursue, Ltd. (1975) 420 U.S. 592 ..... 9, 10

Mitchum v. Foster (1972) 407 U.S. 225 ..... 7, 11

Pennzoil Co. v. Texaco, Inc. (1987) 481 U.S. 95 10

Pierson v. Ray (1967) 386 U.S. 547 12

Sosna v. Iowa (1975) 419 U.S. 393 9

Stump v. Sparkman (1978) 435 U.S. 349 12

United States v. St. Bernard Parish (5th Cir. 1985) 756 F.2d 1116 11

Younger v. Harris (1971) 401 U.S. 37 ..... 2, 6, 7, 9, 10, 11

OTHER AUTHORITIES:

Anti-Injunction Act, Title 28, United States Code Section 2283 6

Civil Rights Act, Title 42 United States Code Section 1983 ..... 6, 7, 12

California Government Code Section 69595 11

California Rules of Court, Rule 8(b) 2, 8

No. 87-1357

In The

Supreme Court of the United States

October Term, 1987

THOMAS R. ANGEL AND LORETTA C. ANGEL,

Appellants,

v.

JUDGES CHARLES W. FROEHLICH, JR., F. V. LOPARDO, GILBERT NARES and DON MARTINSON,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

MOTION OF APPELLEES TO DISMISS OR AFFIRM

To: The Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellees, Judges Charles W. Froehlich, Jr., F. V. Lopardo, Gilbert Nares, and Don Martinson move the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Ap-

peals for the Ninth Circuit on the grounds that it is manifest that the appeal does not present a substantial federal question, that any federal question sought to be reviewed was not timely and properly raised, and that the judgment rests on an adequate nonfederal basis.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was not certified for publication but is reprinted as Appellants' Appendix A. The order of the United States District Court for the Southern District of California is reprinted as Appellants' Appendix B.

PROVISION INVOLVED

The California Rules of Court, Rule 8(b) provides a method for correction and certification of a record on appeal in the California Court of Appeals and Supreme Court and is set forth as Appendix 1.

ISSUE PRESENTED

Whether the Anti-Injunction Act, Doctrines of Judicial Immunity, and/or Abstention Principles of *Younger v. Harris* (1971) 401 U.S. 37 apply to appellants' action.

STATEMENT OF THE CASE

Appellants brought an action under the Civil Rights Act, 42 U.S.C. section 1983, seeking injunctive relief against four California Superior Court judges. They allege due process violations with respect to rulings made and acts taken in litigation. (Pet. App. A-2). The district court granted appellees' motion to dismiss on May 26, 1987 (Pet. App. B-2). The Court of Appeals for the Ninth Circuit affirmed the district court's order on January 27, 1988. (Pet. App. A-3)

The appellants complain of events in three related state court actions. The appellants allege the appellee judges falsified the court reporter's transcripts in three related lawsuits brought in the Superior Court of California for the County of San Diego. The appellants filed the original state court action for specific performance of a contract to transfer real property. (San Diego County Superior Court Case No. N 8598). This case was settled before trial by the attorney for appellants, allegedly without their knowledge, and judgment was entered October 29, 1978 and signed by the Honorable Charles W. Froehlich, Jr., Judge of the Superior Court for the County of San Diego. The settlement appeared to relate to the first two causes of action and the remaining causes of action were dismissed as part of the settlement. (Petition pp. 5-6).

The second lawsuit was a complaint to set aside the judgment in the first lawsuit and alleged extrinsic fraud (San Diego County Superior Court Case No. N 14705). In the second action, a summary judgment was granted against appellants (Petition p. 6).

With regard to an unspecified proceeding, Judge Froehlich was scheduled to hear a motion set for October 10, 1980. On September 22, 1980, appellants filed, pursuant to California Code of Civil Procedure section 170.3, a "Statement of Disqualification" of Judge Froehlich to hear any matters with regard to the proceeding (Petition p. 6). The hearing on the "Statement of Disqualification" of Judge Froehlich was heard by Appellee Judge F. V. Lopardo (Petition p. 7). Appellants allege the reporter's transcript of this hearing specifies that "argument" was not reported (Petition p. 7). Apparently, the court reporter was following the standard procedure of recording all events in open court except the "argument" of counsel or pro per. Appellants also complained of the reporter's transcript in a hearing before Appellee Judge Gilbert Nares. The reporter's transcript set forth that the "argument" was not stenographically reported (Petition p. 8). Appellants make no reference to the case or proceeding which Judge Nares heard.

The third lawsuit (San Diego County Superior Court Case No. N 23298) was an action against appellants for malicious prosecution involved in the second lawsuit. A judgment was entered, after verdict of the jury, in the amount of $154,000 against appellants (Petition p. 6).

Appellee Judge Don Martinson heard the malicious prosecution trial against appellant (San Diego County Superior Court Case No. N 23298). Appellants allege the reporter's transcript was falsified against appellants. Appellants state one such falsification involved a pre-trial stipulation on admissible evidence which was recorded in the presence of the judge, and was changed against appel-

lants during the trial by the judge. During the trial, appellants requested the court reporter to read back the stipulation, which the court did not allow (Petition pp. 8 and 9). Appellants also alleged Judge Martinson fixed the jury against them (Petition p. 2). To support this allegation, appellants state as follows:

> "At such trial before the verdict was pronounced and in fact while the jury was in the process of returning to the jury box, the opposition attorney grabbed his clients [sic] arm and said, 'We got it,' [sic] (Petition p. 9).

The appellants, at the conclusion to the petition, synopsize by saying:

> "It is common knowledge among attorneys that court reporter's transcripts of trials and hearings are routinely falsified by judges in the San Diego North County Superior Court." (Petition p. 28)

The appellants also advise that they referred this matter to appropriate local agencies for consideration, without success, and stated at page two of their petition:

> "Appellants preceded by filing complaint herein with the San Diego grand jury, the District Attorney of San Diego, Attorney General John K. Van de Kamp, and the State Board of Control of California. All of whom refused to take up the complaint." (Petition p. 2)

SUMMARY OF ARGUMENT

The District Court concluded appellants did not state a constitutional basis for their claim, and the Anti-Injunction Act precluded their action. Similarly, the Court of Appeals for the Ninth Circuit concluded judicial immunity insulated the appellees from appellants' suit. As the Jurisdictional Statement herein shows, all acts of which appellants complain were within the scope of the court's jurisdiction. (*Stump v. Sparkman* (1978) 435 U.S. 349). Appellants allege an action under 42 U.S.C. Section 1983, yet failed to exhaust their state appellate remedies; the abstention principles of *Younger v. Harris* (1971) 401 U.S. 37 apply.

The issuance of an injunction would be ineffectual where the action is to restrain only four of at least fifty-two sitting superior court judges in San Diego County.

ARGUMENT

I

APPELLANTS HAVE NOT STATED A CLAIM FOR INJUNCTIVE RELIEF

A. The Anti-Injunction Act Applies to Appellants' Claim

The Anti-Injunction Act, Title 28, United States Code Section 2283, provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The district court determined appellants did not state a constitutional basis for their claim. The district court

concluded no claim was stated by operation of the Anti-Injunction Act. (Petition Appendix B) Similarly, the Court of Appeals for the Ninth Circuit determined that appellants "ostensibly" sought injunctive relief against the appellee judges, but that judicial immunity insulated the judges from the suit. (Petition Appendix A). Where no constitutional claim arises, appellants' action is barred by the Anti-Injunction Act.

B. The Abstention Principles of Younger v. Harris (1971) 401 U.S. 37 Apply To Bar Appellants' Action Where They Did Not Fashion A Justiciable Constitutional Claim.

Appellants assert the underlying complaint is brought pursuant to 42 U.S.C. section 1983. A proceeding for a violation of Constitutional rights under color of state law pursuant to 42 U.S.C. section 1983 is an exception to the Anti-Injunction Act (*Mitchum v. Foster* (1972) 407 U.S. 225). Nevertheless, even if appellants could properly plead a Section 1983 action, the cause of action for injunction relief itself must be appropriate. As this court stated in *Mitchum v. Foster, supra*:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." (407 U.S. at 243)

This Court had previously enunciated " . . . the national policy forbidding federal courts to stay or enjoin pending state court process except under special circumstances." (*Younger v. Harris* (1971) 401 U.S. 37, 41). This Court stated that even where a state statute is unconstitutional on its face, no injunction may issue unless

the state law is " . . . 'flagrantly and patently violative of express Constitutional prohibitions' . . ." (401 U.S. at 53) or where there is a " . . . showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief . . ." (401 U.S. at 54).

In their "question presented" appellants allege the unconstitutionality of California Rules of Court, Rule 8(b). This rule is applicable only to the California Supreme Court and the California Court of Appeal (not the California Superior Court, which is a trial court in California). Rule 8 relates to the *record on appeal.* (See Appendix 1) As appellants' "statement of the case" reflects (Petition pp. 5-10), appellants did not exhaust their state remedies of appeal to the California Court of Appeal and the California Supreme Court. This is important particularly as to appellants' second lawsuit. That action sought to declare the judgment in the land sale action void due to extrinsic fraud. Therefore, Rule 8(b) never became applicable to appellants and, in all events, is merely a rule of procedure.

As set forth in their "statement of facts," appellants complain of the events within three judicial proceedings. The original lawsuit was an action for specific performance of the conveyance of real property (San Diego County Superior Court Case No. N 8593). The case was settled short of trial by the attorney for appellants, allegedly without their knowledge, and judgment was entered on October 20, 1978 and signed by Judge Charles W. Froehlich (Petition p. 6). On September 22, 1980, appellants filed a statement of disqualification with regard to Judge Froehlich as to unspecified proceedings.

The second lawsuit of appellants was a complaint to set aside the judgment in the first case as rendered due to extrinsic fraud (San Diego County Superior Court Case No. N 14705) and ended with the court granting a summary judgment against appellants (Petition p. 6). Apparently, the appellants did not appeal the judgment entered in this case. The third action was a complaint against appellants themselves for malicious prosecution (San Diego County Superior Court Case No. N 23298, Petition p. 6).

Appellants are unable to phrase any "unusual circumstances" which would entitle them to equitable relief in this Court. Resultingly, appellants present no basis for injunctive relief under Section 1983. The *Younger v. Harris, supra,* principles are applicable even though the state proceeding is civil in nature. (*Hoffman v. Pursue, Ltd.* (1975) 420 U.S. 592, 594; see also *Sosna v. Iowa* (1975) 419 U.S. 393, 396-397, fn3; *Hicks v. Miranda* (1975) 422 U.S. 332, 351, fn20)

As this Court has stated:

> "The seriousness of federal judicial interference with State civil functions has long been recognized by this Court. We have consistently required that when Federal Courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. (*Hoffman v. Pursue, Ltd., supra,* 420 U.S. 592, 603).

In *Hoffman v. Pursue, Ltd., supra,* this Court held at page 609:

> "We therefore hold that *Younger* standards must be met to justify federal intervention in a state ju-

> dicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." (See also *Pennzoil Co. v. Texaco, Inc.* (1987) 481 U.S. —) 95 L.Ed.2d 1, 19, fn16)).

Appellants' lack of confidence in the state court appellate system is of no consequence. As this Court has also held:

> "More importantly, we are of the opinion that the considerations of comity and federalism which underlie Younger permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet, Art. VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do. The District Court should not have entertained this action, seeking preappeal interference with a state judicial proceeding, unless appellee established that early intervention was justified under one of the exceptions recognized in Younger." (*Hoffman v. Pursue, Ltd,* supra, 420 U.S. 592, 610-611)

The fact that the time for appeal in state court has expired does not deter application of *Younger v. Harris, supra,* principles. As this Court has admonished, appellants "cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner". (*Pennzoil Co. v. Texaco, Inc.* (481 U.S. —, 95 L.Ed.2d 1, 19 fn16.)

As the Ninth Circuit Court of Appeals noted, appellants " . . . *ostensibly* sought injunctive relief against several California Superior Court judges. . . ." (Emphasis added; Pet. App. A-2). *Younger v. Harris, supra,* 401 U.S. 37 abstention principles apply where appellants have not exhausted their state appellate remedies. Appellants failed to state a justiciable claim under Section 1983. As the district court found, there is a lack of jurisdiction (28 U.S.C. § 1343). (Petition, App. B-2)

II

NO INJUNCTION MAY ISSUE SINCE IT WOULD BE INEFFECTUAL

It is well settled that injunctive relief may not issue which would be ineffectual (*United States v. St. Bernard Parish* (5th Cir. 1985) 756 F.2d 1116, 1123). Here the judicial appellees are only four of at least 52 possible superior court judges in San Diego County. (Cal. Gov. Code § 69595) Enjoining these judges would do nothing to halt judicial action on the subject civil matters. Additionally Judges Froehlich and Lopardo are retired and no "threatened act" can be anticipated, nor can they be compelled to take any judicial act.

To the extent that injunctive relief might be deemed appropriate, in the interests of comity and federalism (see *Mitchum v. Foster, supra,* 407 U.S. at 243, any relief would be proper against private litigants and not the judges of the state court.

———o———

III

THE DOCTRINE OF JUDICIAL IMMUNITY PRECLUDES APPELLANTS FROM STATING A CONSTITUTIONAL CLAIM

The appellants cannot state a constitutional claim against the appellee judges herein. Title 42 U.S.C. section 1983 (1982) was not intended to abolish the doctrine of judicial immunity. (*Pierson v. Ray* (1967) 386 U.S. 547, 554-555). Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." (*Clearinger v. Saxner* (1985) 474 U.S. 193, 199-200, quoting *Bradley v. Fisher* (1872) 80 U.S. (13 Wall.) 335, 347). Judges' immunity from civil liability is not "affected by the motives with which their judicial acts are performed." (*Clearinger v. Saxner, supra,* 474 U.S. 193, 200, quoting *Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) 335, 347.) In their Jurisdictional Statement, appellants do not state a constitutional claim and injunctive relief is not available to appellants. As the Court of Appeal determined, all of the judges' acts of which appellants complain were within the scope of the court's jurisdiction. (Pet. App. A-2) These acts were functions normally performed by a judge. Appellants clearly state they dealt with the appellee judges in the judges' judicial capacity. (See *Stump v. Sparkman* (1978) 435 U.S. 349, 362.)

———o———

CONCLUSION

For the reasons set forth herein, appellees' motion to dismiss the appeal herein or in the alternative, to affirm the judgment of the court of appeals for the Ninth Circuit, should be granted.

Respectfully submitted,

LLOYD M. HARMON, JR.,
County Counsel
DANIEL J. WALLACE, Chief Deputy
Counsel of Record

By:

LEONARD W. POLLARD II, Deputy
Attorneys for Appellees

APPENDIX 1

CALIFORNIA RULE OF COURT, RULE 8

(a) Immediately on the completion of the reporter's transcript and any clerk's transcript the clerk shall mail notice thereof to all parties, and within 10 days after mailing of such notice, any party may file a request for correction of such transcripts. If no request for correction is filed within such time, the clerk shall certify the record as correct.

(b) If any party files a request for correction of the transcript within such time, the clerk shall set a time not more than 10 days thereafter for certification of the transcripts by the judge who tried the case, and shall give not less than 5 days' notice thereof to all parties. At the time set or at the time to which the judge may continue the hearing, he shall determine the request for correction, and if none is allowed, shall certify the transcripts as correct. If corrections are allowed by the judge, he shall fix the time within which they shall be made by the clerk or reporter within 30 days after their allowance. The parties at any time may stipulate that the whole or any portion of the record is correct, and such stipulation shall render unnecessary the certification by either the clerk or judge of the record or the portion stipulated to by the parties.

(c) If the appellant desires to have any portion of the record other than the clerk's transcript printed, he shall notify the clerk in writing at or prior to the certification of the record or the stipulation of the parties thereto. Within 15 days after certification or stipulation

he shall file with the clerk the portion of the record so printed, and the clerk shall compare and certify the same as correct.